

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE, INC.,

Plaintiff,

v.

ZILLOW, INC., et al.

Defendants.

Case No. 2:21-cv-00312-TSZ

**MEMORANDUM IN SUPPORT OF
OBJECTION TO DEFENDANT’S
RELIANCE ON COUNSEL
EVIDENCE**

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3 **INTRODUCTION**

4 Plaintiff, REX – REAL ESTATE EXCHANGE, INC. (“REX”), by and through the
5 undersigned counsel, hereby objects to Defendant’s repeated reliance on counsel evidence.

6 **ARGUMENT**

7 In its opening¹ and during Ms. Thomas’s testimony² Zillow asserted that certain of its
8 actions (e.g., its decision not to use “MLS” and “non-MLS” labels for its Tabs; the separation
9 of MLS and non-MLS listings) were based on legal advice that such actions were required.

10 During Ms. Thomas’s testimony, REX objected both on foundation and hearsay grounds
11 (Ms. Thomas was not a lawyer and did not even receive the advice directly herself from the
12 lawyer who formulated it) and on the grounds that Zillow’s lawyers were not available for
13 cross-examination.³ In addition, during pretrial proceedings Zillow provided no notice that it
14 would rely on advice of counsel, and in fact both withheld documents, and instructed
15 witnesses not to answer deposition questions, on grounds of attorney client privilege.
16

17 It is a bedrock principal that a party cannot use the attorney-client as both a sword and
18 shield, which is precisely what Zillow seeks to do here. *See Kaiser Found. Health Plan, Inc.*
19 *v. Abbott Labs., Inc.*, 552 F.3d 1033, 1042 (9th Cir.2009) (“The privilege which protects
20 attorney-client communications may not be used both as a sword and a shield.”); *Columbia*
21 *Pictures TV, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001)
22 (quoting *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.1992) (“The privilege
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26 ¹ Sept. 19, 2023, Trial Tr. 51:16-23; *id.* at 53:7-10.

27 ² Sept. 21, 2023, Trial Tr. 82:8-17.

28 ³ Sept. 21, 2023, Trial Tr. at 82:4-6; *id.* at 82:25 – 83:4; *id.* at 104:15– 106:3.

1 which protects attorney-client communications may not be used both as a sword and a shield.
2 Where a party raises a claim which in fairness requires disclosure of the protected
3 communication, the privilege may be implicitly waived.”).

4 Here, Zillow invoked the privilege to block discovery into its communications with its
5 counsel and so should not be permitted to rely on the privilege as a sword. Such
6 gamesmanship is improper. *See Apple Inc. v. Samsung Elecs. Co., Ltd.*, 306 F.R.D. 234, 242–
7 43 (N.D. Cal. 2015) (“Improperly invoking privilege as a shield and a sword, Samsung's use
8 placed the privileged information at issue while improperly limiting Apple and Nokia's ability
9 to assess or challenge these assertions.”).

11 **CONCLUSION**

12 For the foregoing reasons, REX asks that the Court:

13 (1) Instruct Zillow counsel that they should not, and that they should instruct their
14 witnesses not, to refer to legal advice or reasons for any of Zillow’s actions.

15 (2) Instruct the Jury to disregard any assertion by Zillow’s counsel or its witnesses
16 that any Zillow action was taken based on legal considerations or advice.
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19 Dated: September 25, 2023

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OBJECTION TO DEFENDANT’S
RELIANCE ON COUNSEL EVIDENCE

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